

These are the tentative rulings for civil law and motion matters set for Thursday, July 25, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, July 24, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

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**EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY THE HONORABLE MICHAEL W. JONES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 43, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.**

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**1. M-CV-0047828      Capital One Bank USA, N.A. vs. Robinson, James M.**

Plaintiff's Motion to Set Aside Default and Default Judgment

As an initial matter, the court notes that this is the second motion to set aside brought by plaintiff. The first motion was denied by the court on August 16, 2012. Yet plaintiff provides no explanation why the second motion is renewed almost a year later without any discussion of the requirements of either CCP§1008(a) or CCP§1008(b). If treated as a motion for reconsideration, it is obviously untimely under CCP§1008(a). If treated as a renewal motion, plaintiff has failed to establish any new or different facts, circumstances, or law as required pursuant to CCP§1008(b). Thus, the motion has significant procedural defects.

Even without these deficiencies, the substance of plaintiff's motion is inappropriate to grant. Plaintiff seeks relief from the default entered on December 16, 2010 along with relief from the default judgment entered on February 28, 2011. However, it invokes CCP§473(b) to support such relief. Under the discretionary relief or mandatory relief pursuant CCP§473(b), such a request must be made within six months of the entry of the default and/or default judgment. (CCP§473(b); *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 901.) This second request is made two and half years after the entry of the default and more than two years after the entry of the default judgment. The motion cannot be interpreted as timely to afford relief pursuant to CCP§473(b).

Nonetheless, the court has the inherent power to set aside a default and default judgment based upon equitable grounds. In this regard, it may deem a motion for relief pursuant to CCP§473(b) as seeking equitable relief. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981; *Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 47.)

Specifically, the court may determine that extrinsic mistake exists where “ ‘a mistake led a court to do what it never intended....’ [Citations.]” (*Ibid.*) It is plaintiff that seeks to set aside the default and default judgment, providing an attorney declaration stating that the documents were submitted to the court without knowledge that defendant was active in the military. Since the court would not have entered the default or default judgment if it had known of defendant’s active military status, as such status would afford defendant protections under the Servicemembers Civil Relief Act, the court deems the motion as one seeking equitable relief. The default, entered on December 16, 2010, is set aside and the judgment, entered on February 28, 2011, is vacated based upon extrinsic mistake.

**2. M-CV-0052272      Asset Acceptance, LLC vs. Lofgren, Lindsay**

Plaintiff’s Motion for Judgment on the Pleadings is continued to August 15, 2013 at 8:30 a.m in Department 40 in light of the request for continuance filed by the defendant on July 15, 2013.

**3. M-CV-0058368      Unifund CCR, LLC vs. Marshall, Steven A.**

Defendant’s Motion to Quash

As an initial matter, defendant is reminded that Local Rule 20.2.3 requires the information concerning the court’s tentative ruling procedure be included in the notice of motion.

Defendant’s motion is denied. It is true that after a defendant challenges the court’s personal jurisdiction based upon improper service, the burden shifts to the plaintiff to establish effective service of process. (*Dill v. Berquist Const. Co., Inc.* (1994) 24 Cal.App.4th 1426, 1439-1440; *Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 413.) However, this assumes that an appropriate challenge has been presented to the court. A review of the motion shows significant deficiencies. Procedurally, the motion does not comply with the requirements of CRC Rules 3.1112 and 3.1113. First, there is no actual motion filed by defendant. (CRC Rule 3.1112(a).) Second, there is no memorandum of points and authorities filed by defendant. (CRC Rule 3.1112(a), 3.1113.) The court may overlook harmless procedural errors that do not affect the substantial rights of the parties. (CCP§475; *Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1252.) In this instance, the defects fail to properly notify the opposing party of the basis of the motion and prevent the court from properly addressing the substantive issues. The court cannot overlook these deficiencies.

Furthermore, the declaration in support of the motion is deficient. Defendant states that he is not a resident of Placer County and has not lived at the address where service was effectuated for the last 10 years. (Marshall declaration p. 2:18-19.) He does not state where he currently resides or the length of time that he has resided at his current residence. Defendant’s declaration also directly contradicts with other portions of his motion. While Defendant states he does not live in Placer County and has not lived in the county for over 10 years, the address listed on the motion is for a residence in Auburn,

California and located in Placer County. For these reasons, there are significant procedural and substantive deficiencies that warrant denial of the motion.

**4. S-CV-0026470 Loomis Land, Inc. vs. Stoneridge Realty Inc., et al**

Appearance of the parties is required on Plaintiff's Motion to Continue Trial.

**5. S-CV-0026928 Dwelle, David W. vs. Frederick, Mark R., et al**

The two motions for attorneys' fees are continued, on the court's own motion, to August 13, 2013 at 8:30 a.m. in Department 32 to be heard by the Honorable Mark S. Curry.

**6. S-CV-0029262 Karr, William G. vs. Leep, Inc. et.al.**

Robert F. Sinclair and Sinclair Wilson Baldo & Chamberlain's Motion to be Relieved as Counsel for defendant Leep, Inc. is granted and Mr. Sinclair and the law firm shall be relieved as counsel of record effective upon the filing of the proof of service of the signed order upon defendant Leep, Inc.

**7. S-CV-0029932 McCollam, Patrick, et al vs. Max Software, Inc., et al**

Plaintiff's Motion to Strike Answer, Deem Admissions Admitted, and Terminating Sanctions is continued to August 22, 2013 at 8:30 a.m. in Department 40 at the request of the moving party.

**8. S-CV-0030358 Decker, Chris, et al vs. Omni Structures & Management, Inc.**

Cross-Defendant RW Callison Construction's (RW Callison) Motion for Leave to File Cross-Complaint

RW Callison's motion is granted. The trial court has discretion to grant permission to a party seeking to file a permissive cross-complaint. (*Crocker National Bank v. Emerald* (1990) 221 Cal.App.3d 852.) After carefully reviewing the moving papers, the court finds that RW Callison has brought the current motion in a timely manner and the granting of the request will not unduly prejudice any of the parties in the action.

RW Callison shall file and serve its cross-complaint on or before August 2, 2013.

If oral argument is requested, RW Callison's request for telephonic appearance is granted. The party is informed that it must make arrangements for the telephonic appearance through CourtCall pursuant to Local Rule 20.8.A.2.

Cross-Defendant Ross Shoop dba St. John Roofing's (St. John Roofing) Motion for Leave to File Cross-Complaint

St. John Roofing's motion is granted. The trial court has discretion to grant permission to a party seeking to file a permissive cross-complaint. (*Crocker National Bank v. Emerald* (1990) 221 Cal.App.3d 852.) After carefully reviewing the moving papers, the court finds that St. John's Roofing has brought the current motion in a timely manner and the granting of the request will not unduly prejudice any of the parties in the action.

St. John Roofing shall file and serve its cross-complaint on or before August 2, 2013.

If oral argument is requested, St. John Roofing's request for telephonic appearance is granted. The party is informed that it must make arrangements for the telephonic appearance through CourtCall pursuant to Local Rule 20.8.A.2.

**9. S-CV-0030882      Ace Body Shop & Towing, et al vs. City of Lincoln, Calif.**

Defendant's Motion for Terminating and Monetary Sanctions

The motion is granted as to the request for monetary sanctions. Defendant is awarded \$2,358.00 in reasonable attorney's fees incurred as a result of plaintiffs' failure to comply with the court's prior order pursuant to CCP§§2023.030(a) and 2030.010(d), (g). However, the court declines to issue terminating sanctions at this time. The court notes that a single motion to compel has been heard in this action. There exist other sanction options available, including issue and evidentiary sanctions, which defendant has yet to pursue prior to seeking this severe form of sanction against plaintiffs. Nonetheless, plaintiffs' continued dilatory actions and failure to comply with the court's orders may result in the court entertaining a motion for terminating sanctions pursuant to CCP§2023.030(d) in the future.

**10. S-CV-0031614      Asset Acceptance, LLC vs. Valenzuela, Gonzalo**

Plaintiff's second Motion to Vacate Judgment is dropped from the calendar as plaintiff failed to re-notice and re-serve the motion.

**11. S-CV-0031762      Holland, Joe, et al vs. Ford Motor Company**

The motion to compel is dropped from the calendar as no moving papers were filed with the court.

**12. S-CV-0031902      CACH, LLC vs. Oguinn, Mark**

The motion to deem matters admitted is dropped from the calendar as no moving papers were filed with the court.

**13. S-CV-0032298                      Gjestland, Robert vs. William L. Lyon & Associates, et al**

Plaintiff's Motion to Quash Subpoena for Business Records is dropped from the calendar at the request of the moving party.

**14. S-CV-0032438                      Siddiqui, Azmat S., et al vs. Bank of America, N.A., et al**

Defendant Bank of America's (BoFA) Demurrer to the Second Amended Complaint (SAC)

Ruling on Request for Judicial Notice

Defendant's request for judicial notice of Exhibits 1 through 8 is granted pursuant to Evidence Code §452.

Ruling on Demurrer

This is the third demurrer brought by this defendant challenging plaintiffs' operative pleading. In this most recent demurrer, defendant again challenges all of the causes of action. Plaintiffs' SAC now only has four causes of action, as they eliminated the prior action for intentional misrepresentation from the current pleading. These four causes of action include: (1) violations of Civil Code §§2923.5, 2924.17, and 2923.55; (2) violations of Civil Code §§2934a, 2924b, and 2924f; (3) promissory estoppel; and (4) UCL violations. A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) As previously stated by this court, a demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or the accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) All properly pled facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.) To reiterate, the court assumes that all facts are true and a pleading will not withstand a demur if the causes of action fail to allege sufficient facts.

In reviewing the first cause of action for violations of Civil Code §§2923.5, 2924.17, and 2923.55, the SAC fails to allege sufficient facts. This cause of action includes 11 specific paragraphs of allegations in support of plaintiffs' claim that defendant violated the aforementioned sections of the Civil Code. However, the court focuses upon the need for factual allegations of violations. In each of the 11 paragraphs, plaintiffs merely make conclusory statements that defendant did not comply with the specific statutory requirements of Sections 2923.5, 2924.17, and 2923.55. Conclusory assertions that defendant did not comply, without more, are insufficient to allege such violations. Furthermore, these 11 paragraphs, which contain simple conclusory statements of violations, are contradicted by subsequent paragraphs in the third cause of action. For example, plaintiffs assert in paragraph 21 that defendant did not contact them

to explore options to avoid foreclosure. In paragraph 40, plaintiffs allege that they received correspondence from defendant notifying them of several available loan modification programs. These contradictory factual allegations undermine the sufficiency of the first cause of action. Either the defendant violated these specific sections of the Civil Code or they did not; plaintiff cannot assert both positions in their SAC and expect to withstand a demurrer. Thus, the first cause of action fails.

The same conclusory allegations also permeate through the second cause of action. Here, plaintiffs allege that defendant violated another series of Civil Code sections, this time Sections 2934a, 2924b, and 2924f, with minimal factual references. Even if the court were to accept that the factual allegations were sufficient, plaintiffs fail to allege sufficient facts as to how they were prejudiced by these imperfections in the foreclosure process. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256.) Since the factual allegations are conclusory pled and fail to demonstrate any prejudice from the alleged violations to Sections 2934a, 2924b, and 2924f, the second cause of action also fails.

The court has previously stated that a promissory estoppel cause of action requires a showing of “(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.” (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901 citing *Laks v. Coast Federal Savings & Loan Ass.* (1976) 60 Cal.App.3d 885, 890.) The third cause of action fails in two key respects. First, the factual allegations do not sufficiently allege the existence of a clear and unambiguous promise. Plaintiffs allege that after being asked a series of questions over the telephone, they were told that they qualified for a loan modification. (SAC ¶40.) There are no allegations that plaintiffs were told they were approved for a loan modification. Further, plaintiffs allege that they were told about several types of loan modifications that were available to them. (*Ibid.*) Yet the factual allegations do not clearly identify which option was the subject of the alleged promise. Without such factual allegations, there can be no clear and unambiguous promise. Second, there are insufficient facts to establish plaintiffs’ reliance upon the statement that they qualified for a loan modification was reasonable and foreseeable. As previously stated, plaintiffs allege that they were told they would “qualify” for a loan modification, not that they had been granted a modification. (*Ibid.*) However, they go on to allege in paragraph 41 as if a modification had been negotiated between the parties to support their reliance and choice not to proceed with a short sale. There is no connection between these two allegations to sufficiently show that their reliance upon defendants’ statements was reasonable. Therefore, the third cause of action fails.

This leaves the fourth cause of action for UCL violations. The UCL does not proscribe specific activities, instead, it “borrows” violations from other laws to prohibit unlawful, unfair, or fraudulent business acts or practices. (*Puentes v. Wells Fargo Home Mortg., Inc.* (2008) 160 Cal.App.4th 638, 643-644.) Plaintiffs’ fourth cause of action relies upon the previous three, which the court has already described as deficient. Since

the underlying causes of action that support plaintiffs' UCL claim fail, so too does the fourth cause of action.

The court now turns to the issue of leave to amend. Plaintiffs bear the burden of demonstrating how the SAC may be amended to cure the defects therein. (*Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302.) It has discretion to sustain a demurrer without leave to amend where the plaintiff fails to make a showing of a reasonable possibility that the defects in the pleading may be cured with an amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) This is plaintiffs' third version of the complaint. Despite having two opportunities to amend and correct the deficiencies, they have failed to allege sufficient facts to establish each cause of action. The court has carefully reviewed the SAC, which does not lend itself to an amendment. The court has also carefully considered plaintiffs' opposition, where plaintiffs tacitly refute any pleading deficiencies without suggestions of any possible amendments. It is presumed that the facts alleged in the complaint and in the moving papers state the strongest case for the plaintiffs. (see *Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1286.) Even assuming the most liberal reading of the SAC, in conjunction with the broadest view of the opposition, the court cannot find that plaintiffs have made a showing that the aforementioned deficiencies may be cured with another pleading. Based upon the foregoing, the demurrer is sustained without leave to amend.

If oral argument is requested, defendant's request for a telephonic appearance is granted. The defendant is informed that it must make arrangements for the telephonic appearance through CourtCall pursuant to Local Rule 20.8.A.2.

**15. S-CV-0032502          Flynn, Michael J., et al vs. Fields, Ty, et al**

Defendant Carrie Fields' Demurrer is overruled. The court notes that the substance of the current demurrer is almost identical to the demurrer heard by the court on June 27, 2013 and brought by defendant Ty Fields. As previously stated, a demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) Upon reviewing the complaint, the five causes of action are sufficiently pled.

Defendant shall file and serve her answer or general denial on or before August 16, 2013.

If oral argument is requested, plaintiffs' request for a telephonic appearance is granted. The plaintiffs are informed that they must make arrangements for the telephonic appearance through CourtCall pursuant to Local Rule 20.8.A.2.

**16. S-CV-0033046                      Arnold, Duke - In Re the Petition of**

The Petition for Minor's Compromise is granted. After careful consideration of the petition and supporting attachments, the court finds that the settlement is in the best interest of the minor. (Probate C§§2504, 3500; CCP§372; *Pearson v. Superior Court (Nicholson)* (2012) 202 Cal.App.4th 1333, 1337.) If oral argument is requested, the appearance of the minor at the hearing is waived.

**17. S-CV-0033160                      Holley, Amie Hope - In Re the Petition of**

The Petition for Minor's Compromise is granted. After careful consideration of the petition and supporting attachments, the court finds that the settlement is in the best interest of the minor. (Probate C§§2504, 3500; CCP§372; *Pearson v. Superior Court (Nicholson)* (2012) 202 Cal.App.4th 1333, 1337.) If oral argument is requested, the appearance of the minor at the hearing is waived.

**18. S-CV-0033166                      Voss, Michael, et al vs. Evangelista, Bernard**

The three Petitions for Minor's Compromise are continued to August 8, 2013 at 8:30 a.m. in Department 40 at the request of the moving parties.

**19. S-CV-0033308                      Stacy Deanne Johnson vs. Green Tree Servicing, et al.**

Plaintiff's Application for Temporary Restraining Order and Order to Show Cause is denied. As an initial matter, the court notes that plaintiff failed to properly notice the defendants of the current hearing. The court's July 9, 2013 order stated that the ex parte order, summons, complaint, and any application were to be personally served in accordance with Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure. Instead, plaintiff served the defendants by mail. The defendants have not been properly noticed or served so the application cannot be granted.

Even if the court were to consider the merits of the application, it would still be denied. The court may grant a preliminary injunction when it appears from the complaint that the plaintiff is entitled to the demanded relief and would suffer irreparable injury if the enjoined action were allowed to proceed. (CCP§526(a).) A foreclosure sale may be enjoined under the same elements applicable to other requests for injunctive relief, namely after a (1) balancing of the hardships of the parties and (2) a showing by the plaintiff of a reasonable probability of prevailing on the merits. (*Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust* (1985) 168 Cal.App.3d 818, 824; *Robbins v. Superior Court* (1985) 38 Cal.3d 199.) The plaintiff has the burden of showing he/she would be harmed if the preliminary injunction were not granted. (*Casmalia Resources, Ltd. v. County of Santa Barbara* (1987) 195 Cal.App.3d 827, 838.)

As to the initial analysis of hardship upon the plaintiff, she claims that as a divorced mother of two young children, her family has lived in no other home and they will have nowhere else to go. (Johnson declaration ¶10.) The harm to the defendants is



the loss of the opportunity to proceed with the foreclosure along with the proceeds from the sale. In light of this, the hardship tips in favor of plaintiff.

Nonetheless, the court must still consider the second prong of the test; whether there is a reasonable probability that plaintiff will prevail on the merits of the action. The application focuses upon the Homeowners' Bill of Rights and Civil Code §2923.4 as the basis for the preliminary injunction. The complaint also alleges causes of action for breach of contract, intentional deceit, negligent deceit, violations of the covenant of good faith and fair dealing, and wrongful foreclosure. All of these causes of action are based upon the same factual allegations; that the defendants stated they would modify her loan if she made three timely payments of \$1,393.30. (Johnson declaration ¶2.)

The deficiency in this case is that plaintiff fails to submit sufficient evidence to demonstrate a reasonable probability she will prevail on the merits of her complaint. Plaintiff offers her own declaration as the only evidence to support the current request. The declaration is only three pages in length and includes no documentary evidence to corroborate any of the allegations made in her complaint. The evidence is deficient in several ways. First, plaintiff has not established that the parties entered into a written agreement to modify plaintiff's home loan. Second, she has not established the terms of any alleged written agreement. Third, she has failed to show compliance with the terms of any alleged agreement. Fourth, plaintiff has not shown the defendants refused to modify her loan. Finally, she has insufficiently shown the existence of a foreclosure sale. With all of these deficiencies, plaintiff has not met her burden of showing a reasonable probability of prevailing on the merits of her complaint. The OSC is denied and the temporary restraining order is dissolved forthwith.

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